(3) (2)

Nos. 94-890, 94-907

In the Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

NATIONAL RAILWAY LABOR CONFERENCE,
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
RESPONDENTS

BURLINGTON NORTHERN RAILROAD COMPANY,
PETITIONER

v.

NATIONAL RAILWAY LABOR EXECUTIVES' ASSOCIATION,
ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE REGIONAL AIRLINE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE REGIONAL AIRLINE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

This brief is submitted by the Airline Industrial Relations Conference ("Aircon") and the Regional Airline Association ("RAA"), as *amici curiae* in support of the petitioners.[1]

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court concurrently with this brief.

INTERESTS OF AIRCON AND RAA AS AMICI CURIAE

Aircon is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues, and to represent its member carriers in these areas with respect to legislative, judicial and administrative matters. Its carrier members include most major and national scheduled air carriers in the United States.

The Regional Airline Association is a trade organization whose members are engaged in scheduled air transportation of passengers and cargo in short-haul markets throughout the United States and its territories. The RAA is chartered to promote a healthy business climate for the growth of regional airlines by working with appropriate legislative and regulatory bodies and with the public, the press and other organizations, on issues affecting the industry. In 1992, RAA members transported approximately 93 percent of all regional airline passengers.

Aircon, the RAA and their member air carriers have a substantial interest in this case.[2] The *en banc* decision of the lower court concludes by the barest majority (5 to 4) that the National Mediation Board ("NMB" or the "Board") lacked statutory authority under the Railway Labor Act ("RLA") to promulgate its *Railroad Merger Procedures*.[3] The decision therefore implicates the Board's counterpart *Airline Merger Procedures*[4] which apply to

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[2] The decision of the *en banc* panel of the lower court is reported as *Railway Labor Exec. Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) and is also appended to Petitioner Burlington Northern Railroad Company's petition for writ of certiorari at pages 1a through 62a.

[3] *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Railroad Industry*, 17 NMB 44 (1989).

[4] *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Airline Industry*, 14 NMB 388 (1987).

Aircon's and RAA's member carriers.[5] Since the 1987 inception of the merger procedures, the Board has decided more merger cases under the *Airline Merger Procedures* than the *Railroad Merger Procedures* because of the greater frequency of such transactions in the airline industry.[6]

The *Airline Merger Procedures* are critical in the airline industry because they establish a reasoned and well-ordered procedure under which the Board will review and update its previous representation determinations (known as "certifications") regarding the unions that will represent employee groups (known as "crafts or classes"), in the wake of mergers or other transactions that change a carrier's corporate identity or structure. Because of the frequency of transaction-driven changes affecting union representations in the heavily-unionized airline industry, the *Airline Merger Procedures* have played a central role in avoiding labor strife and related litigation in this vital transportation industry.

Aircon and RAA fully support the positions taken by Petitioners National Railway Labor Conference ("NRLC") and Burlington Northern Railroad Company ("BN") with regard to the *Railroad Merger Procedures.* Neither of those entities, however, is an air carrier, or represents air carriers, or can speak directly to the particularly destabilizing impact on the airline industry of judicial invalidation of the *Airline Merger Procedures.* Aircon and RAA, therefore, respectfully submit that because of its potential impact on the airline industry, the *en banc* decision invalidating the parallel *Railroad Merger Procedures*

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[5] The *Railroad Merger Procedures* were developed by the Board in 1989 based on the *Airline Merger Procedures* developed earlier in 1987. *Railroad Merger Procedures*, 17 NMB at 44. An earlier challenge to the *Airline Merger Procedures* on similar grounds of NMB authority was rejected. *International Brotherhood of Teamsters v. NMB*, 118 Lab. Cas. (CCH) ¶ 10,678 (D.D.C. 1990).

[6] *See* Note 7 *infra.*

presents an important question of federal law within the meaning of Rule 10.1(c) of this Court.

ARGUMENT

I. THE *EN BANC* DECISION WILL HAVE A DESTABILIZING EFFECT ON LABOR RELATIONS IN THE AIRLINE INDUSTRY.

It is not hyperbole to state that judicial invalidation of the *Airline Merger Procedures* would be a prescription for chaos in airline labor relations. Indeed, Judge Williams in his dissent below, cited the destabilizing impact of the majority's decision on the airline industry as Aircon and the RAA had argued as *amici* below:

> [I]nvalidation of the merger procedures would likely place a cloud over the status of the certifications, voluntary recognitions, and revocation of certifications resulting in [previously decided applications], and could result in unnecessary litigation and disrupt the stable post-merger collective bargaining relationships now in place.
>
> The destabilizing impact of the loss of the merger procedures would be even more significant in the future. . . .
>
> [Before the merger procedures, carrier decisions made without NMB clarification] frequently resulted in unresolved disputes, litigation and potential disruptions of airline operations.

29 F.3d at 675; BN petition at 46a.

This Court has long recognized that questions of whether one union or another union is the proper representative of a group of employees is "an explosive problem." *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 303 (1943). Partly as the result of the 1978 deregulation of the airline industry, there has been a proliferation of mergers and other cor-

porate transactions that continually raise RLA representation questions. Many of the most difficult labor disputes in the post-deregulation airline industry have involved the impact of corporate transactions on union representation and collective bargaining.

The Board reacted to this proliferation of merger-related representation disputes with its decision in *TWA/Ozark*, 14 NMB 218 (1987). That decision clarified the Board's policies with respect to the effect of mergers on existing union certifications and established interim "merger procedures," which were formalized in the *Airline Merger Procedures* that same year. *Airline Merger Procedures*, 14 NMB 388 (1987). Both the interim and final procedures mandated *carrier notice* to the Board concerning pending transactions, so the Board could *sua sponte* determine the impact of the transaction on existing NMB certifications.

Under *TWA/Ozark* and the *Airline Merger Procedures*, the Board has been remarkably successful in resolving potentially divisive representation disputes that invariably arise from corporate mergers or similar transactions. The Board has decided 16 airline industry merger cases since 1987.[7] Those 16 cases have resolved the representation of almost 100 different crafts or classes on the industry's largest airlines—American, Delta, Federal Express, TWA, and USAir.

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[7] *USAir/Shuttle, Inc.*, 19 NMB 388 (1992); *Pennsylvania Airlines/Allegheny Commuter*, 19 NMB 362 (1992); *SAHSA/TAN*, 19 NMB 17 (1991); *Command Airways/Nashville Eagle*, 18 NMB 372 (1991); *Air Wisconsin/Aspen Airways*, 18 NMB 336 (1991); *Federal Express/Flying Tiger Line*, 16 NMB 433 (1989); *Metroflight/Chaparral Airlines*, 18 NMB 56 (1990); *USAir/Piedmont*, 16 NMB 412 (1989); *British Airways/British Caledonian Airways*, 16 NMB 17 (1988); *Braniff/Florida Express*, 15 NMB 294 (1988); *USAir/PSA*, 15 NMB 135 (1988); *Alaska Air/Jet America*, 15 NMB 42 (1987); *Midway Airlines/Air Florida*, 14 NMB 447 (1987); *Delta Airlines/Western Airlines*, 14 NMB 291 (1987); *American Airlines/Air California*, 14 NMB 379 (1987); *TWA/Ozark*, 14 NMB 218 (1987).

Most merger-related representation disputes have been resolved by the Board determining which of the existing, pre-merger union certifications apply to the new, post-merger carrier. Minority unions have had their certifications terminated by the Board only where the union was unable to demonstrate sufficient employee support among the combined, post-merger craft or class. *See, e.g., Delta/Western,* 14 NMB 291 (1987). Where the size of merging workforces have been comparable, the Board has deferred action on existing certifications pending an election to determine the majority representative. *See, e.g., Federal Express/Flying Tiger,* 16 NMB 433 (1989); *USAir/Piedmont,* 16 NMB 412 (1989). As the 16 cases illustrate, the Board has used the *Airline Merger Procedures* to resolve live representation disputes, arising among employees, concerning who is the majority representative of the combined craft or class of employees under Section 2 Fourth of the Act, 45 U.S.C. § 152 Fourth.

Prior to the NMB's promulgation of the *Airline Merger Procedures,* representation disputes in the airline industry had proliferated in the federal courts. *See, e.g., Air Line Employees Ass'n v. Republic Airlines, Inc.,* 798 F.2d 967 (7th Cir.), *cert. denied,* 479 U.S. 962 (1986); *Int'l Broth. of Teamsters v. Tex. Int'l Air,* 717 F.2d 157 (5th Cir. 1983); *Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc.,* 656 F.2d 16 (2d Cir. 1981); *Int'l Ass'n of Machinists v. Northeast Airlines,* 536 F.2d 975 (1st Cir.), *cert. denied,* 429 U.S. 961 (1976); *Broth. of Railway and Steamship Clerks v. United Air Lines, Inc.,* 325 F.2d 576 (6th Cir. 1963). The federal courts routinely declined to resolve such disputes citing the NMB's exclusive jurisdiction over representation matters.

One such dispute involving the Delta-Western merger came before Justice O'Connor. The Ninth Circuit enjoined the Delta-Western merger less than 24 hours before its consummation. *IBTCHWA, Local Union No. 2707 v.*

Western Air Lines, Inc., 813 F.2d 1359 (9th Cir. March 31, 1987), *vacated and remanded*, 484 U.S. 806 (1987). Justice O'Connor stayed the Ninth Circuit's injunction pending the filing and disposition of a writ of certiorari. Justice O'Connor concluded that the Circuit's decision was contrary to "the great weight of the case law suppor[ting] the proposition that disputes as to the effect of collective bargaining agreements on representation in an airline merger situation *are representation disputes within the exclusive jurisdiction of the National Mediation Board*" and that the Circuit's divergence from this principle would likely prompt at least four Justices to vote to grant certiorari. *Western Air Lines v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305, 1307 (April 2, 1987) (O'Connor, J., in chambers) (emphasis added). Soon after this 1986-87 litigation, the NMB adopted its interim merger procedures, and resolved the representation issues presented by the Delta-Western merger. *Delta Airlines/Western Air Lines*, 14 NMB 291 (1987).

Judicial invalidation of the *Airline Merger Procedures* potentially would raise the issue of the retrospective impact on *Delta/Western* and the 15 other decided merger cases—involving almost 100 NMB representation determinations. Labor relations inertia and the fact that many unions joined in "carrier invocation" of the *Airline Merger Procedures* may, as a practical and legal matter, limit such retrospective challenges.[8] But at a minimum, invalidation of the *Airline Merger Procedures* will cast a cloud of uncertainty over many merger-related representation determinations of the NMB.

The prospective destabilizing impact of the *en banc* decision is even more important. If the *Airline Merger*

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[8] The *amici* are aware of one case, *May et al. v. Shuttle, Inc. et al.*, C.A. No. 94-1019 (SS), in which a collateral challenge to the NMB's *USAir/Shuttle*, 19 NMB 388 (1992) decision is being pursued by a group of former Shuttle employees based upon the *en banc* decision.

Procedures are not available, how will transaction-related disputes concerning union representation be resolved in future mergers? In the absence of Board direction, carriers and unions may be forced to return to the pre-*Merger Procedures* approach, which regularly resulted in unresolved disputes, litigation and potential disruptions of airline operations. *See TWA/Ozark*, 14 NMB at 233.

An even more destabilizing potential outcome of the panel decision would be multiple, minority union representations within a single craft or class on an air carrier, the pattern that the Respondents apparently espouse in the railroad context. If the *en banc* decision stands, a minority union in a merger could avoid having its certification extinguished simply by not invoking the NMB's Section 2 Ninth processes. Where a minority union is merged into a non-union craft or class (as in the *Delta/Western* merger), no labor organization will have any incentive to apply to the Board to terminate the minority union's bargaining rights. When two or more unions have been certified to represent employees in the same craft or class, the *en banc* decision invites the unions to make deals among themselves concerning post-merger preservation of minority union representation. As long as the unions are satisfied with their continued, partial representation and do not make formal application to the NMB, then under the *en banc* decision there would be no procedure to achieve a single representative for each craft or class and the Board, apparently, will be without jurisdiction over this obvious representation dispute.

Such a "balkanization" of airline representation has been expressly and wisely rejected by the Board.[9] In Aircon's and RAA's view such fragmented representation

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[9] "The pattern of representation which has resulted in the railroad industry has, in the Board's judgment led to uneven representation, duplication of effort, and confusion; and has significantly reduced the ability of railroads to integrate operations and manage a single rail system . . . [T]he Board does not intend to foster a similar pattern of representation in the airline industry." *Republic Air Lines/Hughes Air Corp.*, 8 NMB 49, 54-5 (1980).

would produce great labor relations discord and unnecessary litigation, would prevent the operational integration of merged airlines, and would violate the RLA's statutory requirement of systemwide craft or class representation.[10]

II. THE AIRLINE MERGER PROCEDURES DO NOT RESULT IN "CARRIER-INVOKED" REPRESENTATION INVESTIGATIONS.

A central assumption of the *en banc* decision is that the *Railroad Merger Procedures* grant carriers standing to initiate "carrier-invoked" representation investigations despite the asserted absence of statutory authority to do so. In design and application, however, the *Airline* and *Railroad Merger Procedures* are an exercise of the Board's inherent power to determine, *after* a change in the corporate identity or composition of the carrier, the *continued* validity of certifications originally issued in representation proceedings clearly within the Board's jurisdiction. Thus, the lower court erroneously read the merger procedures as creating a "carrier-invoked" procedure, when, in fact, the Board has enforced the *Merger Procedures* as an exercise of the Board's own power to police its prior certifications.[11]

Ironically, the Board first adopted the *TWA/Ozark* interim merger procedures with the express purpose of *limiting, not expanding* carrier influence over merger-related representation issues. The Board found that under

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[10] Section 2 Fourth provides that: "The majority of any craft or class of employees shall have the right to determine who shall be *the representative* of the craft or class. . ." (emphasis added). This singular usage in the statute mandates a single post-merger representative, and provides an express statutory basis for the *Merger Procedures*.

[11] Despite the lower court's ruling, Aircon and the RAA believe that the Board has the authority to permit carriers to invoke representation procedures. *See Brotherhood of Railway and Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 666-67 (1965). Nonetheless, that issue is not necessarily presented under the *Railroad* or *Airline Merger Procedures*.

its prior decision "carriers have interpreted the *Republic* case to give them independent authority to extinguish existing certifications held by organizations on the acquired carrier; to choose between recognition of organizations on its property or the acquired carrier; and to choose whether or not employees on the acquired carrier will be represented." 14 NMB at 233.[12] Thus, in the absence of the merger procedures, carriers, in effect, simply asserted the power to make *de facto* representation decisions.

In reaction, the Board exercised its statutory authority over representation issues by requiring carriers to give the Board notice of mergers and similar corporate transactions concurrent with required filings with other Federal regulatory agencies. *TWA/Ozark*, 14 NMB at 241-2; *Airline Merger Procedures*, 14 NMB at 390-1, Subpart B (1). Indeed, Aircon members, after the public announcement of corporate transactions, have been advised formally through letters from the NMB of their obligation to file under the *Merger Procedures*.[13]

Thus, it is inaccurate to view the *Railroad* or *Airline Merger Procedures* as giving carriers standing to present representation disputes to the Board—the central reason the *en banc* court found that the *Railroad Merger Procedures* exceeded the NMB's statutory authority. Rather, the Board has mandated that carriers give the Board

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[12] The *TWA/Ozark* decision was plainly intended by the Board to assist incumbent unions' interests in corporate transactions. Airline unions have sought aggressively to have the Board take jurisdiction and resolve "single carrier" issues presented by corporate relations between carriers. *See, e.g., Continental Airlines/ Continental Express*, 20 NMB 326 (1993); *Flagship Airlines, Inc.*, 20 NMB 139 (1993); *Henson Aviation, Inc.*, 18 NMB 441 (1991); *Precision Valley Aviation*, 18 NMB 486 (1991); *Eastern Airlines, Inc.*, 17 NMB 432 (1990).

[13] This Board-imposed filing requirement has a statutory basis in Section 2 Ninth, 45 U.S.C. § 152 Ninth, which provides: "The Board shall have access to and have power to make copies of the books and records of the carrier to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

notice of corporate transactions, so that the Board may *sua sponte* investigate and determine the effect, if any, on previously issued certifications. Any legal analysis of the Board's authority to issue and apply the *Merger Procedures* must be premised upon the accurate characterization of those procedures as an assertion of the Board's authority to determine the continued validity of its certifications.

III. THE RLA GRANTS THE BOARD AUTHORITY TO REVIEW THE CONTINUED VALIDITY OF BOARD-ISSUED CERTIFICATIONS WHEN CORPORATE TRANSACTIONS CHANGE THE IDENTITY OR COMPOSITION OF THE CARRIER FOR WHICH THE CERTIFICATION WAS ISSUED.

The Board's jurisdiction to determine the post-merger validity of its previously-issued representation certifications, after a change in the carrier's corporate identity, is necessarily implied under Sections 2 Ninth and 2 Fourth of the Railway Labor Act. The *en banc* court's legal analysis is incorrect because it ignores both the Board's statutory authority to determine *who is the carrier* for representation purposes and the fact that corporate transactions invariably present the issue of which *existing certifications* are applicable to a post-merger carrier.

Section 2 Ninth of the Act is carrier-specific: it deals with disputes "among a carrier's employees" and requires the Board to certify representatives "to the carrier." That provision gives the Board the authority to determine, as an initial matter in representation disputes, whether an entity is a "carrier" under the Act's definitions, and then issue a carrier-specific certification to a union. *See, e.g., Delpro Co. v. Brotherhood of Railway Carmen*, 519 F. Supp. 842 (D. Del. 1981), *aff'd*, 676 F.2d 960 (3d Cir. 1982), *cert. denied*, 459 U.S. 989 (1983).

The Board's statutory authority for the *Merger Procedures* is not based upon a new representation application from a group of employees, but rather, is derivative of the Board's authority to issue the original, carrier-specific

certifications which are affected by the corporate transaction.[14] As the Board has correctly concluded, "the creation, change, and the termination of representation rights are within the province of the Board under the Railway Labor Act." *Airline Merger Procedures*, 14 NMB at 389. Mergers present the question of whether Board-issued, carrier-specific certifications are still valid under the Section 2 Fourth requirement of systemwide representation, and the Board has concluded that it has the authority under Section 2 Ninth to resolve such issues.

The courts have clearly and consistently held that the NMB has exclusive jurisdiction of representation disputes and that the courts have no jurisdiction to adjudicate the continued validity of Board-issued certifications. *See Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943).[15] The Respondents' ultimate argument, adopted by the D.C. Circuit, is that the NMB has no jurisdiction to modify or terminate its own certifications, *unless* a union invokes the representation procedures with a new dispute. But, the Railway Labor Act provides no

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[14] The Board's authority in this area is analogous to that of any administrative agency to retain jurisdiction over a matter after initial resolution. *See, e.g., Penn Central Merger Cases*, 389 U.S. 486, 501, 521 (1968).

[15] As Petitioners BN and NRLC have noted, the *en banc* decision's conclusion otherwise is in conflict with a decision of the Sixth Circuit upholding the *Railroad Merger Procedures*. *See Brotherhood of Maintenance of Way Employees v. Grand Trunk Western Railroad*, 961 F.2d 1245 (6th Cir. 1992); BN Petition at 23-25; NLRC Petition at 17-18. Moreover, the *en banc* decision is inconsistent with the D.C. Circuit's own prior decisions—including a decision by Judge Edwards, author of the *en banc* decision—giving effect to NMB actions changing, amending or terminating previously-issued certifications. *See International Longshoremen's Ass'n v. NMB*, 870 F.2d 733 (D.C. Cir. 1989) (reviewing and remanding to the Board a case in which the NMB *sua sponte* terminated previously issued certification); *Association of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d 1432 (D.C. Cir. 1994) (Edwards, J.) (determining contractual impact of NMB termination of certifications in *USAir/Shuttle*, 19 NMB 388 (1992)).

basis for concluding that the certified union should have the unilateral power to determine the continued validity of its own "license" to represent employees.[16]

The ultimate result of Respondents' position and the *en banc* decision is that the Board would have the power only to issue certifications, and no statutory authority to determine that a certification is no longer valid, *even when the carrier for whom it was issued has merged with another carrier or no longer exists.* That truncation of Board authority makes no sense as a matter of national labor policy, and there is no basis for the Court to find that Congress intended such a limitation on the NMB's authority under Section 2 Ninth.

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[16] A Board-issued certification is a "license" to represent certain employees of a carrier, and the Board's role is analogous to a licensing agency. At common law, a licensing agency's authority to issue licenses implicitly includes the authority to revoke the licenses. *See,* 51 Am. Jur. 2d § 58 Licenses and Permits; 53 C.J.S. § 51 Licenses; *Mounts v. Chafin,* 411 S.E.2d 481, 487 (W.Va. 1991); *Woodbury v. Municipal Council of Gloucester,* 61 N.E.2d 647 (Mass. 1945); *Butcher v. Maybury,* 8 F.2d 155 (W.D.Wash. 1925).

CONCLUSION

The Court should grant review to determine whether Congress' intent to make the Board the sole arbiter of representation disputes under the Act includes Board authority to continue, modify, or terminate those certifications when the carrier's identity or composition is changed through a corporate transaction. Because that interpretation does no violence to the express language of Section 2 Ninth, and is consistent with the long-recognized exclusive Board jurisdiction of representation disputes, upon review the Court should reverse the 5 to 4 *en banc* decision of the D.C. Circuit.

Respectfully submitted,

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